

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANILO ARTURO VELASQUEZ,

Plaintiff,

v.

U. S. MARSHALS, et. al.,

Defendants.

No. C 15-02535 EJD (PR)

ORDER OF DISMISSAL WITH LEAVE
TO AMEND

Plaintiff, a federal prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis will be granted in a separate written order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is

1 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be
 2 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
 3 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
 5 elements: (1) that a right secured by the Constitution or laws of the United States was
 6 violated, and (2) that the alleged violation was committed by a person acting under the
 7 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff's Claims**

9 Plaintiff alleges that during his arrest on or about September 14, 2009¹, he was
 10 brutally beaten by members of the U.S. Marshals Office and San Francisco Police
 11 Department, and thereby permanently injured and suffered significant brain damage.
 12 (Compl. at 1.) Plaintiff claims that he did not resist arrest or provoke the beating. (Id.)
 13 Liberally construed, Plaintiff states a claim of excessive force in violation of the Fourth
 14 Amendment. See Pierce v. Multnomah County, Oregon, 76 F.3d 1032, 1043 (9th Cir.
 15 1996).

16 However, Plaintiff fails to identify any Defendant by name, and rather states that
 17 John Does #1 - #5 are San Francisco Police Officers and John Does #1 - #5 are U.S.
 18 Marshals. (Compl. at 2.) Although the use of "John Doe" to identify a defendant is not
 19 favored in the Ninth Circuit, see Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980);
 20 Wiltsie v. Cal. Dep't of Corrections, 406 F.2d 515, 518 (9th Cir. 1968), situations may
 21 arise where the identity of alleged defendants cannot be known prior to the filing of a
 22 complaint. In such circumstances, the plaintiff should be given an opportunity through
 23 discovery to identify the unknown defendants, unless it is clear that discovery would not
 24 uncover their identities or that the complaint should be dismissed on other grounds. See
 25 Gillespie, 629 F.2d at 642; Velasquez v. Senko, 643 F. Supp. 1172, 1180 (N.D. Cal.

26
 27
 28 ¹Plaintiff asserts that due to his injuries, he merits tolling of the statute of limitations.
 (Compl. at 3.)

1 1986). Failure to afford the plaintiff such an opportunity is error. See Wakefield v.
 2 Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999); Crowley v. Bannister, 734 F.3d 967,
 3 978 (9th Cir. 2013) (abuse of discretion to deny plaintiff an opportunity to amend to name
 4 correct defendants).

5 Because this action cannot proceed without any named Defendants upon which the
 6 action can be served, Plaintiff shall be given an opportunity to file an amended complaint
 7 identifying at least one John Doe defendant.

8 9 CONCLUSION

10 For the foregoing reasons, the Court orders as follows:

11 1. The complaint is DISMISSED with leave to amend. Within **twenty-eight (28)**
 12 **days** of the date this order is filed, Plaintiff shall file an amended complaint using the
 13 court's form complaint. The amended complaint must include the caption and civil case
 14 number used in this order and the words "AMENDED COMPLAINT" on the first page
 15 and write in the case number for this action, Case No. C 15-02535 EJD (PR). Plaintiff
 16 must answer all the questions on the form in order for the action to proceed.

17 **Failure to respond in accordance with this order by filing an amended**
 18 **complaint will result in the dismissal of this action without prejudice and without**
 19 **further notice to Plaintiff.**

20 The Clerk shall include two copies of the court's complaint with a copy of this
 21 order to Plaintiff.

22
 23 DATED: 8/3/2015


 EDWARD J. DAVILA
 United States District Judge

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Case Number: CV15-02535 EJD

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 8/3/2015, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Danilo Arturo Velasquez 14341-111
HAZELTON
U.S. PENITENTIARY
Inmate Mail/Parcels
P.O. BOX 2000
BRUCETON MILLS, WV 26525

Dated: 8/3/2015

Richard W. Wieking, Clerk
/s/By: Elizabeth Garcia, Deputy Clerk